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DEC 20 2000

OFFICE OF PETITIONS
A/C PATENTS

In re Application of
Jeffrey L. Hill
Application No. 09/352,192
Filed: July 12, 1999
Attorney's Docket No. DYN-6D-2

ON PETITION

This is a decision on the petition, filed October 26, 2000 under 37 C.F.R. § 1.137(a) to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. 37 CFR 1.137(d). Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)."

This application became abandoned for failure to timely submit a proper response to the final Office action mailed on January 28, 2000. The application became abandoned on April 29, 2000. A Notice of Abandonment was mailed on August 25, 2000.

The provisions of 37 CFR 1.137(a) provide that where the delay in reply was unavoidable, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(a). A grantable petition pursuant to 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition does not satisfy requirement (3) above.

Failure to Present and Adequate Showing of Unavoidable delay

The Commissioner may revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable". 35 USC 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in

determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Heinrich, 1913 Dec. Comm'r pat. 139, 141 (Comm'r Pat. 1913). In addition, decision on revival are made on a case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, the burden of showing the cause of the delay is on the person seeking to revive the application, Smith v. Mossinghoff, *Id.*, and a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

The test of unavoidable delay is the "reasonably prudent person" test set forth in In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912): "the test of whether the delay is unavoidable is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business".

There are three periods to be considered in treating a petition to revive under 37 CFR 1.137(a): (1) the delay in reply that originally resulted in the abandonment; (2) the delay in filing an initial petition pursuant to 37 CFR 1.137 to revive the application; and (3) the delay in filing a grantable petition pursuant to 37 CFR 1.137 to revive the application.

With respect to the first period, an application is abandoned "unavoidably" only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

The showing on the record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Petitioner asserts that the cause of delay in filing a timely reply to the non-final Office action mailed January 28, 2000, was due to the untimely receipt of an inexplicably late delivery of a bundle of mail held by the USPS. However, petitioners statements alone are insufficient as a basis for an adequate showing of unavoidable delay.

An adequate showing of late receipt of a PTO communication should include (1) evidence showing the date of receipt of the PTO action at the correspondence address (e.g., a copy of the PTO action having the date of receipt of the PTO action at the correspondence address stamped thereon, a copy of the envelope (which contained the PTO action) having the date of receipt of the PTO action at the correspondence address stamped thereon, etc.), and a statement establishing how the evidence presented establishes the date of receipt of the PTO action. Other forms of probative evidence may include statements from Postal Service personnel, copies of docket record and incoming mail logs, or other evidence of nonreceipt of Official communications in accordance with MPEP § 711.03(c), with statements explaining how the evidence presented supports the statements made.

If revival of the above-identified application is pursued, petitioner may also wish to consider filing a petition under 37 CFR 1.137(b) to revive an unintentionally abandoned application. A grantable petition to revive an abandoned application under 37 CFR 1.137(b) must be accompanied by: (1) the required reply (unless previously filed), which may met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute, but must be the payment of the issue fee or any outstanding balance thereof in an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof; (2) the petition fee required by 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) a terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)). A blank petition for revival under 37 CFR 1.137(b) is provided for petitioner's convenience.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Assistant Commissioner for Patents
Box DAC
Washington, DC 20231

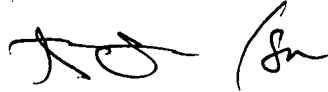
By FAX: (703) 308-6916
Attn: Office of Petitions

By hand: Office of Petitions
2201 South Clark Place
Crystal Plaza 4, Suite 3C23
Arlington, VA. 22202

Telephone inquiries should be directed to Petitions Attorney, Jennifer M. Hayes, at (703) 306-5608.



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Office of Petitions
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for Patent Examination Policy



Beverly M. Flanagan
Supervisory Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
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Attachment: blank form for Petition to Revive an Unintentionally Abandoned
Application under 37 CFR 1.137(b)